IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. 3:18-cr-00001
	)	JUDGE RICHARDSON
ROBERT ADKINS (1)	)	
KARA ADKINS (2)	)	

ORDER

Before the Court is Defendant Robert Adkins' Motion to Suppress (Doc. No. 45, "the Motion"), joined by Defendant Kara Adkins (Doc. No. 70). Through the Motion, Defendants seek to suppress all evidence obtained as fruits of an execution of a search warrant at their home. Defendants contend that the search warrant was invalid for two reasons: (1) the search warrant affidavit rested almost exclusively on the fruits of an illegal search because Google employees acted as government agents when searching (without a warrant) the contents of Defendant Kara Adkins' Google account(s); and (2) on its face, the warrant affidavit failed to establish probable cause to search Defendants' home, including the requisite nexus to Defendants' home.[1]

In response, not surprisingly, the Government, took the opposite position on each of these issues, asserting that: (1) Google was acting as a private party when it conducted the search of Defendant Kara Adkins' Google account(s); and (2) the affidavit demonstrated probable cause (including the requisite nexus to Defendants' house). The Government also asserted alternatively

[1] Defendants argue that much information was missing from the search warrant affidavit that was necessary to establish probable cause, including: (1) the date the cybertip was generated by the National Center for Missing and Exploited Children ("NCMEC"); (2) the date of the original upload of the images; (3) the location at which the upload of the images occurred; and (4) the address of Kara Adkins at the time the images were uploaded. In essence, Defendants assert (among other things) that for all one can tell from the affidavit, the information upon which the affidavit is based may be stale. (Doc. No. 53).

that the good-faith exception would apply even the affidavit failed to demonstrate probable cause. (Doc. No. 53).

The Fourth Amendment applies only to government action and does not constrain private parties "not acting as an agent of the [g]overnment or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). It is the defendant's burden to prove that a private party acted as an agent or instrument of the government by "demonstrat[ing] two facts: (1) Law enforcement 'instigated, encouraged or participated in the search' and (2) the individual 'engaged in the search with the intent of assisting the police in their investigative efforts.'" *United States v. Shepherd*, 646 F. App'x 385, 388 (6th Cir. 2016) (citing *United States v. Hardin*, 539 F.3d 404, 419 (6th Cir. 2008)).

"Probable cause 'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *United States v. Christian*, No. 17-1799, 2019 WL 2308021, --F.3d--, at *2 (6th Cir. May 31, 2019) (en banc) (citing *United States v. Tagg*, 886 F.3d 579, 585 (6th Cir. 2018)). In its very recent en banc decision in *Christian*, the Sixth Circuit instructed that probable cause should be determined "[v]iewing the 'totality of the circumstances,' *Florida v. Harris*, 568 U.S. 237, 244 [] (2013), through the 'lens of common sense,' as the Supreme Court has instructed, *id*. at 248[.]" *Id.* at *2. The court further explained:

> Time and again the Supreme Court has emphasized that [p]robable cause is not a high bar to clear. Where, as here, a magistrate has issued a search warrant based on probable cause, we do[ ] not write on a blank slate. Rather, the magistrate's probable-cause determination should be paid great deference, and we overturn that decision only if the magistrate arbitrarily exercised his or her authority. We are not permitted to attempt a *de novo* review of probable cause.

Id. at *4 (citations and quotation marks omitted). The "'haste of a criminal investigation' under which officers often draft an affidavit supporting a search warrant" is also relevant to a probable cause analysis. *Id*. at *3. Courts should keep in mind that "police officers are mostly non-lawyers

who must draft search-warrant affidavits 'on the basis of nontechnical, common-sense judgments[.]'" *Id*. (quoting *Illinois v. Gates*, 462 U.S. 213, 235-36 (1983)).

The search warrant affidavit must establish a nexus between the place to be searched and the evidence sought. *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc). The crime of possession of child pornography "is generally carried out in the secrecy of the home and over a long period[.]" *United States v. Paull*, 551 F.3d 516, 522 (6th Cir. 2009) (citing *United States v. Wagers*, 452 F.3d 534, 540 (6th Cir. 2006)). "Unlike cases involving narcotics that are bought, sold, or used, digital images of child pornography can be easily duplicated and kept indefinitely even if they are sold or traded. In short, images of child pornography can have an infinite life span." *United States v. Frechette*, 583 F.3d 374, 378 (6th Cir. 2009) (citing *Paull*, 551 F.3d at 522).

Pursuant to *United States v. Leon*, 468 U.S. 897, 905 (1984), "the introduction of evidence obtained in violation of the Fourth Amendment is permitted in criminal trials when the evidence is 'obtained in the reasonable, good-faith belief that a search or seizure was in accord with the Fourth Amendment.'" *United States v. Moorehead*, 912 F.3d 963, 968 (6th Cir. 2019) (quoting *Leon*, 468 U.S. at 909). A search warrant affidavit is insufficient for police to rely upon in good-faith if it is properly considered "bare bones." But if an affidavit is not bare-bones, it is one upon which an officer can rely in good-faith. *Christian*, 2019 WL 2308021, at *5.[2]

[2] Although prevalent, the term "good-faith" as used in this context appears actually to be a misnomer. The "good faith" exception does not turn on the officers' "good-faith"—a subjective concept—but on whether their actions were objectively reasonable. *See United States v. Savoca*, 761 F.2d 292, 294 n.1, 295 (6th Cir. 1985). On the other hand, the Sixth Circuit found the good-faith exception applicable (alternatively) in *Christian* based in part on the "utter lack of police wrongdoing." *Christian*, 2019 WL 2308021, at *6. The reliance on an apparent case-specific finding of the absence of police misconduct raises the question, which perhaps will be addressed by the Sixth Circuit in the future, whether subjective good faith (or at least the absence of subjective bad faith), may have some role in the *Leon* analysis. If so, that would seem to conflict somewhat not only with cases like *Savoca* that stress the objective nature of the *Leon* inquiry, but also with current Sixth Circuit case law dictating that the inquiry be made based solely on the four corners of the search warrant affidavit. *Id.* at *7 (Thapar, J., concurring) (noting, and criticizing, the rule of *United States v.*

"[T]o be considered bare bones, an affidavit must be 'so lacking in indicia of probable cause' as to make an officer's 'belief in its existence [] objectively unreasonable.'" *Id*. at *4 (quoting *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005))). An affidavit is barebones only if it "merely 'states suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.'" *Id.* (quoting *United States v. Washington*, 380 F.3d 236, 241 n.4 (6th Cir. 2004))). Further, "[t]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id*. at *5 (citation and internal quotation marks omitted).

After reviewing the briefs, the above-stated standards, and the evidence and argument presented at the evidentiary hearing on June 3, 2019, the Court **DENIES** the Motion to Suppress (Doc. No. 45) for the reasons stated on the record at the evidentiary hearing.

IT IS SO ORDERED.

Eli Richardson

ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

Laughton, 409 F.3d 744 (6th Cir. 2005), which "confines us to the words of [the] affidavit in evaluating whether the good-faith exception applies" and "refus[es] to look behind the affidavit" in making this evaluation).